

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**Complaint of Fiber Technologies
Networks, LLC**

D.T.E. 01-70

**RESPONSE TO APPEAL
OF FIBER TECHNOLOGIES NETWORKS, LLC FROM
HEARING OFFICER'S RULING ON
FIBERTECH'S MOTION TO COMPEL DISCOVERY**

Introduction

Pursuant to 220 C.M.R. 1.06(6)(d)(3), and the Hearing Officer's Ruling on Fiber Technologies Networks, LLC ("Fibertech") Motion to Compel Discovery Responses by Shrewsbury's Electric Light Plant's ("SELP") dated February 14, 2002 (hereinafter, Hearing Officer's Ruling on Fibertech's Motion to Compel), SELP hereby files its response to Fibertech's appeal of the Hearing Officer's Ruling on Fibertech's Motion to Compel (hereinafter, "Fibertech's Appeal".) For the reasons set forth below, the Hearing Officer's Ruling on Fibertech's Motion to Compel should be upheld by the Commission of the Department of Telecommunications and Energy ("DTE" or "Department").

ARGUMENT

Fibertech has filed an eight-page appeal of the Hearing Officer's Ruling on Fibertech's Motions to Compel that simply repeats all of the arguments already considered by the Hearing Officer. For the very same reasons as stated previously by SELP in its opposition to in Fibertech's Motion to Compel, Fibertech's Appeal should be denied.

I. Fibertech's "Public Records Act" Argument Must Fail.

In four separate information requests¹, Fibertech seeks production of the same legal opinion from SELP's counsel. First, Fibertech argues that SELP must produce the requested opinion because it does not fall within an exemption to the Public Records Act, G.L. c. 66, § 10, pursuant to G.L. c. 4, § 7, Twenty-Sixth. Fibertech has never made a public record request of SELP.

Regardless, as set forth in SELP's opposition and as recognized in the Hearing Officer's Ruling on Fibertech's Motion to Compel, "[f]ailure or refusal by the custodian of records to comply with a discovery request may be addressed by a petition to the supervisor of public records who decides whether the documents are within the statute...only the supervisor of public records, the Superior Court, or this court [Supreme Judicial Court] is authorized to make such decisions." Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609 (1993); see also, G.L. c. 66, § 10(b).

Fibertech never even bothers to address the rather serious problem with its "public records" argument posed by G.L. c. 66, § 10(b) in its Appeal. Despite the fact that the Supervisor of Public Records would make the decision as to whether SELP's opinion falls within the exemptions under G.L. c. 4, § 7, Twenty-sixth, SELP nonetheless demonstrated that the opinion would in fact constitute an "inter-agency or intra-agency memorandum" exempt from disclosure under subpart (d) of clause 26.

¹ The discovery requests that form the basis of this dispute are Fibertech 2-1, 2-2, 3-4 and 3-9.

II. Fibertech's Waiver Arguments Must Fail.

Fibertech argues that SELP waived its attorney-client privilege by admitting that it submitted the opinion to its very own governing Commission. This argument is completely out of touch with the reality of the operation of municipal light plants under G.L. c. 164, § 56; SELP's Manager operates SELP pursuant to the direction and control of the Commission. See G.L. c. 164, § 56. This is akin to arguing that copying an opinion received by an employee in sales to the company president waives the attorney client privilege. Further, the "intra-agency memorandum" exemption from the Public Records Act would defeat Fibertech's waiver argument in this regard. G.L. c. 4, § 7, Twenty-sixth (d).

Fibertech also argues that SELP waived its attorney-client privilege when it gave copies of the opinion to other Town of Shrewsbury officials. Fibertech's Appeal simply ignores the fact that the opinion was shared with Town officials because it was tied to policy-making decisions regarding the use of the Town's public ways, which is tied to the pole attachment law. See G.L. c. 166, §§ 21, 22 and 25A. As recognized in the Hearing Officer's Ruling on Fibertech's Motion to Compel, there is a strong presumption in favor of preserving the privilege. See Dedham-Westwood Water Dist. V. National Union Fire Insurance Co. of Pittsburgh, No.CIV.A. 96-00044, 2000 WL 33419021, *5 (Mass.Super. February 4, 2000). Fibertech has failed to demonstrate in its original Motion to Compel, and now in its Appeal, that SELP disclosed the opinion to anyone other than an associated, interested party from the Town. See id. Additionally, SELP need not produce the opinion in discovery because it is within the "inter-agency memorandum" exception to the public records law. G.L. c. 4, § 7, Twenty-sixth (d).

Fibertech also argues that SELP waived its attorney-client privilege with regard to the opinion on the basis of the "at issue" doctrine, by allegedly raising advice of counsel as a "defense" to

Fibertech's Complaint. Yet SELP has never placed protected information at issue in this case. This pole attachment case is not a case in which SELP must defend against claims for damages and the like, despite Fibertech's bizarre, repeated attempts to inject "antitrust" issues into this case. There are no "willful" -- as opposed to merely negligent -- violations of G.L. c. 166, § 25A. In any event, such an issue would not be before the Department in a G.L. c. 166, § 25A proceeding. Either Fibertech is legally entitled to an attachment or it is not.

Finally, Fibertech cannot show that access to SELP's legal opinion is vital in order for it to make its case. Dedham-Westwood Water Dist., supra at *6. Obviously the information contained in SELP's legal opinion is available from sources equally available to Fibertech -- the existing law on pole attachments. Fibertech's counsel can make their own legal analysis and argument. They certainly do not need SELP's legal opinions.

CONCLUSION

For all of the foregoing reasons, Fibertech's Appeal should be denied.

Respectfully submitted,

SHREWSBURY'S ELECTRIC
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